No. 86-1382

In the Supreme Court of the United States

OCTOBER TERM, 1986

GERALD SAJER, ET AL., PETITIONERS

v.

ULUS JORDEN, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether members of the military are in all circumstances barred from equitable relief in federal court for alleged constitutional wrongs suffered in the course of military service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-102a) is reported at 799 F.2d 99. The opinion and order of the district court (Pet. App. 103a-124a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1986, and a petition for rehearing was denied on October 23, 1986 (Pet. App. 1a-3a). On January 13, 1987, Justice Brennan extended the time

within which to file a petition for a writ of certiorari to and including February 20, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Ulus Jorden was a master sergeant in the Pennsylvania Air National Guard (PaANG). As a member of PaANG, he was also a member of the Air National Guard of the United States (ANGUS). The National Guard Bureau, an adjunct of the United States Departments of the Army and the Air Force, gives federal recognition to Guard members from individual states, including members of the Air National Guard. The President is empowered to call the Guard into national service. 10 U.S.C. 3495.

Besides being a military member of the Guard, Jorden was employed by the Guard as a full-time civilian technician. Although the technician program is wholly administered by the state, Jorden was considered a federal employee under the National Guard Technicians Act of 1968, 32 U.S.C. 709. In order to be eligible for a technician position, one must be a Guard military member. 32 U.S.C. 709(b).

In October 1984, the Governor of Pennsylvania issued an order calling Jorden to active duty for 23 days of "special training." Jorden was called up alone, without his unit. The order specified that he was to report to a medical center for psychiatric evaluation during the full 23-day period. Pet. App. 32a. Jorden refused to comply with the order, believing that the Governor was not empowered to call out a single guardsman for such a special session. Jorden

consequently was dismissed from his military position in PaANG. As a result, his employment as a technician and his membership in ANGUS were automatically terminated. *Ibid.*

Jorden subsequently filed this suit in the United States District Court for the Eastern District of Pennsylvania. He named as defendants the petitioners here—various of his military superiors in PaANG who were also his civilian supervisors—as well as respondent Emmett Walker, a federal official who was chief of the National Guard Bureau.[1] Jorden alleged that the defendants had engaged in a conspiracy to harass him and to discharge him on the basis of race and in retaliation for the exercise of his First Amendment rights. Jorden sought damages under the First and Fourteenth Amendments, under 42 U.S.C. 1983, 1985 and 1986 and under state tort law. He also sought reinstatement as a military member of PaANG and ANGUS and as a civilian technician.

2. The district court dismissed the entire suit, relying on this Court's decision in *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court in *Chappell* held that a serviceman may not maintain a *Bivens* action for damages against his superior officers for

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[1] Although a co-defendant, Walker is a respondent here because he did not join in the petition for a writ of certiorari or file one on his own behalf. See Sup. Ct. R. 19.6. The National Guard Bureau (NGB) was also named as a defendant, but the court of appeals found (Pet. App. 34a-35a n.3) that Jorden had asserted no jurisdictional basis for the suit against NGB and therefore upheld the district court's dismissal of NGB as a defendant. Since that dismissal has not been challenged, NGB is no longer an interested party to these proceedings and Walker is the sole federal respondent.

alleged constitutional violations. The district court stated (Pet. App. 118a-119a) that the reasons underlying the *Chappell* decision—"the peculiar and special relationship between an enlisted man and his superiors, the effects on discipline by the maintenance of such suits, and Congress' use of its plenary authority over the military to establish a system of review and redress for the military"—applied with as much force to suits for injunctive relief as to suits for damages brought directly under the Constitution or under 42 U.S.C. 1983. The district court accordingly concluded that Jorden was restricted to avenues of redress provided by Congress within the military. "If the subordinate believes his superiors have conspired to violate his constitutional and civil rights," the district court stated, "he must attack their actions before military tribunals" (Pet. App. 120a).

3. The Third Circuit affirmed the dismissal of Jorden's damage claims as barred by *Chappell* but reversed the dismissal of his equitable claims for reinstatement. The court of appeals reasoned (Pet. App. 76a) that claims for reinstatement do not present the same "threat to vigorous decisionmaking" that is posed by claims for money damages. The court further noted (*id.* at 72a) that this Court has entertained numerous suits for injunctive relief by servicemen; indeed, the Court in *Chappell* cited several of these cases as examples of potential "redress in civilian courts for constitutional wrongs suffered in the course of military service" (462 U.S. at 304). The court of appeals therefore declined to adopt "a *per se* rule" (Pet. App. 68a) barring claims for equitable relief. Noting that Jorden's claims for reinstatement would not have required continuing oversight of the Guard of the sort precluded by *Gil-*

ligan v. *Morgan*, 413 U.S. 1 (1973), and that Jorden in all probability had no alternative forum for his claims (Pet. App. 36a-37a n.5),[2] the court of appeals reversed the dismissal of the equitable claims and remanded for further proceedings (*id.* at 80a-81a).[3]

ARGUMENT

Petitioners contend that, under this Court's decision in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), military servicemen are barred from all equitable relief in federal court for alleged constitutional violations. The decision below correctly rejects this extreme position and, in doing so, does not conflict with any decision of this Court or of any other court of

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[2] The court of appeals stated that its precedents favored exhaustion of military remedies, but did not require exhaustion "where the administrative remedy would be inadequate" (Pet. App. 36a-37a n.5). The court observed that Jorden had the possibility of securing some relief from the Air Force Board for the Correction of Military Records (AFBCMR) under 10 U.S.C. 1552, but concluded on balance that "the AFBCMR cannot afford [him] satisfactory relief." The court noted the defendants' concessions that "the AFBCMR, a federal Board, cannot order Jorden's reinstatement to the state Guard" and that "the AFBCMR is a military Board that is arguably not empowered to reinstate Jorden to his civilian technician position in any event." Pet. App. 37a n.5 (citation omitted). Finally, the court noted, "[n]either the district court nor defendants contend that there are adequate state remedies" (*ibid.*).

[3] Judge Gibbons dissented in part. He agreed with the majority that Jorden's suit for injunctive relief was proper, but argued (Pet. App. 84a-102a) that the logic of *Chappell* v. *Wallace* did not require that state military officials be immune from damage suits brought under 42 U.S.C. 1983. Since respondent Jorden has not filed a cross-petition (Sup. Ct. R. 20.5), that issue is not before the Court.

appeals. Accordingly, further review is not warranted in the present interlocutory posture of this case.

1. Petitioners' contention (Pet. 23-24) that all avenues to equitable relief in federal court are closed to members of the military is clearly untenable. As emphasized in *Chappell* v. *Wallace*, 462 U.S. at 304, "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." In our brief in *Van Drasek* v. *Webb*, No. 86-319 (petition for cert. dismissed as improvidently granted May 18, 1987), we explained that an aggrieved serviceman who has exhausted his military remedies has various means available to him to challenge in federal court the constitutionality of military decisions. For example, a serviceman claiming constitutional flaws in his conviction by a court-martial can—after appealing through several layers of intramilitary review, culminating in the Court of Military Appeals (10 U.S.C. (& Supp. III) 1552)—seek relief in federal court, either by petitioning for a writ of certiorari (10 U.S.C. (Supp. III) 867h) or seeking a writ of habeas corpus (*Burns* v. *Wilson*, 346 U.S. 137 (1953)).

Furthermore, the Boards for the Correction of Military Records, which are composed of civilians appointed by the Secretary of each branch of the armed forces, constitute broad avenues by which servicemen may obtain federal court review of a variety of claims pertaining to their service records. Congress has vested each Secretary, acting through such a Board, with plenary power to "correct any military record * * * when he considers it necessary to correct an error or remove an injustice" (10 U.S.C.

1552(a)). In appropriate cases the Board may issue orders leading to reinstatement and an award of back pay (10 U.S.C. 1552(c)). Most significantly, as this Court recently noted, "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. at 303. Thus, a serviceman alleging constitutional violations could well obtain some form of equitable relief in federal court upon review of a Board decision.

Finally, in a limited category of cases, this Court has permitted servicemen to challenge the constitutionality of prescribed military procedures directly, rather than indirectly by means of an attack upon a Board decision. See, *e.g.*, *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986) (First Amendment challenge to Air Force regulation prohibiting servicemen from wearing headgear indoors while on duty); *Brown* v. *Glines*, 444 U.S. 348 (1980) (First Amendment challenge to Air Force regulation authorizing base commanders to regulate circulation of petitions); *Parker* v. *Levy*, 417 U.S. 733 (1974) (attack on provisions of Uniform Code of Military Justice as unconstitutionally vague); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (equal protection challenge to benefit plans for military women).

Petitioners correctly note (Pet. 29) that most of this Court's decisions permitting such immediate recourse to the federal courts have involved attacks by military personnel on the facial validity of statutes or regulations. On the other hand, where (as here) a serviceman does not seek to challenge the facial constitutionality of a statute or regulation, but rather seeks to challenge a discrete personnel decision or similar action by military authorities, exhaustion

of intraservice remedies has generally been required. Permitting a serviceman to bring such a claim directly to federal court—and thereby make the federal courts an alternative forum, rather than a forum of last resort for such complaints—would undermine the system of remedies established by Congress within the armed forces. As this Court has noted (*Noyd* v. *Bond*, 395 U.S. 683, 696 (1969)): "If the military * * * do[es] vindicate [the serviceman's] claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance." See also *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953).

In this case, however, petitioners have apparently conceded (see Pet. App. 37a n.5) that there were no remedies within the Pennsylvania National Guard that Jorden could have been expected to exhaust. Moreover, although Jorden had sought federal intraservice relief by way of a petition to the AFBCMR, the court of appeals noted that there were serious doubts about the AFBCMR's ability to afford relief, inasmuch as Jorden sought reinstatement both to the *state* Guard and to his position as a *civilian* technician. See Pet. App. 36a-37a n.5; *Penagaricano* v. *Llenza*, 747 F.2d 55, 57 (1st Cir. 1984) ("the AFBCMR has no power to force a state to reinstate the officer in the state's Air National Guard"). Under these exceptional circumstances, we do not think that the court of appeals acted unreasonably in permitting Jorden to bring his constitutional claims directly to federal court. The absolute bar to such claims advocated by petitioners is not in keeping with

this Court's jurisprudence and has not been accepted by any court of appeals.[4]

2. Apart from their untenable theory that the federal courts are barred from affording equitable relief even where a serviceman has no other available remedies, petitioners have articulated no rationale that would support reversal of the judgment below. In view of the unique demands of military society, this Court has recognized that the types of claims servicemen should be permitted to bring to federal court must be narrowly defined.[5] In keeping with

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[4] The Fifth Circuit's decision in *Crawford* v. *Texas Army Nat'l Guard*, 794 F.2d 1034 (1986), on which petitioners rely, is not to the contrary. In that case, the court dismissed claims for equitable relief brought by members of the Texas Army National Guard who claimed retaliation in violation of their First and Fourteenth Amendment rights. The plaintiffs in *Crawford*, however, sought not only reinstatement in the Texas National Guard, but also "correction of their military records and reinstatement of eligibility for retirement benefits," matters peculiarly within the competence of the Army Board for the Correction of Military Records (794 F.2d at 1035, 1036). The court accordingly concluded that the plaintiffs had "failed to exhaust available service-connected remedies by appealing to the Army Board," and held that "[t]heir action on this basis should be dismissed pending the conclusion of such remedies" (*id.* at 1036). The court stated that suits for injunctive relief "must be carefully regulated in order to prevent intrusion of the courts into the military structure" (*id.* at 1037), but it did not purport to erect an absolute bar to such claims where no intraservice remedy exists. Rather, it dismissed the claims "without prejudice to the reviewability of any future actions taken by the Army Board for the Correction of Military Records" (*ibid.*).

[5] See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply the Federal Tort Claims Act to suits by servicemen for service-related injuries); *Orloff* v. *Willoughby*,

this line of precedents, most courts of appeals have endorsed the analysis first stated by the Fifth Circuit in *Mindes* v. *Seaman*, 453 F.2d 197 (1971), for determining the reviewability of claims arising incident to military service.[6] Under the "*Mindes* test," a serviceman alleging a deprivation of a constitutional, statutory or regulatory right must first exhaust all available intraservice remedies (453 F.2d at 201). Once that is done, the court must determine the reviewability of his claims by weighing his particular

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345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. 738, 757-758 (1975) (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, *supra* (holding that a serviceman may not bring a *Bivens* action seeking damages for alleged constitutional wrongs). These restrictions on the justiciability of claims raised by servicemen should of course apply whether the case is brought directly to federal court or indirectly as, for example, on review of the decision of a Corrections Board. Although Board decisions generally are reviewable (*Chappell* v. *Wallace*, 462 U.S. at 303), the mere fact that an otherwise nonjusticiable claim has first been passed on by a Corrections Board should not transform it into a justiciable claim.

[6] The so-called "*Mindes* test" has been followed, *e.g.*, in *Rucker* v. *Secretary of the Army*, 702 F.2d 966 (11th Cir. 1983); *Nieszner* v. *Mark*, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983); *Lindenau* v. *Alexander*, 663 F.2d 68 (10th Cir. 1981); *Schlanger* v. *United States*, 586 F.2d 667 (9th Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972).

allegations against the "[t]raditional judicial trepidation over interfering with the military establishment" (*id.* at 199). The Third Circuit, unlike most other courts of appeals, has not adopted the "*Mindes* test." See Pet. App. 79a-80a n.16; *Dillard* v. *Brown*, 652 F.2d 316 (1981). As the panel correctly noted below, however, the claims advanced by respondent Jorden here "would likely be reviewable under a *Mindes* balance," since "[h]e alleges race discrimination and retaliation for the exercise of politically-related speech," and since he appears to lack any adequate remedies within the military (see Pet. App. 80a n.16). In all probability, therefore, the result in the instant case would be the same regardless of whether the *Mindes* test or the Third Circuit's somewhat different analysis were employed.

Petitioners do not challenge the court of appeals' statement that Jorden's claims for equitable relief would be justiciable under the *Mindes* test no less than under the analysis advanced by the court below. Indeed, petitioners do not even cite the *Mindes* case. Nor have they suggested any alternative analysis—aside from an unacceptable blanket ban on claims for equitable relief—under which Jorden's claims would be nonjusticiable. Thus, this case does not raise the question of the propriety of *Mindes* v. *Seaman*, *supra*, and petitioners have failed to articulate any satisfactory grounds for calling into question the decision of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

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